

NO. 94084-3

SUPREME COURT OF THE STATE OF WASHINGTON

POPE RESOURCES, LP and OPG PROPERTIES, LLC,

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES,

Petitioner.

**WASHINGTON STATE DEPARTMENT OF NATURAL
RESOURCES' ANSWER TO AMICUS BRIEF OF THE
DEPARTMENT OF ECOLOGY**

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I. INTRODUCTION

The State of Washington, Department of Ecology (Ecology), has submitted an amicus curiae brief in the present matter urging this Court to adopt its interpretation of the Model Toxics Control Act's (MTCA) definition of "owner or operator" under RCW 70.105D.020(22)(a). Both Ecology and the Department of Natural Resources (DNR) share the same goals of making sure that pollution on state-owned aquatic lands is expeditiously cleaned up, and that the polluters of those lands are not given an incentive to operate in an environmentally destructive manner. But Ecology's interpretation of MTCA simply goes too far: attaching hazardous waste liability to those who do not actually control, or have the ability to control, the operational decisions regarding pollution at a site, while at the same time allowing industrial polluters to profit off the State's taxpayers from that pollution.

Precedent in this state interpreting the exact language of RCW 70.105D.020(22)(a) at issue in this case strikes the right balance by establishing that, to have operator liability under MTCA, a person must "manage, direct, or conduct operations specifically related to pollution. . . ." This is the federal standard for operator liability under the test of *United States v. Bestfoods*, 524 U.S. 51, 66-67, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998), which was adopted by Division I in two separate cases: *Unigard*

Insurance Company v. Leven, 97 Wn. App. 417, 983 P.2d 1155 (1999) and *Taliesen Corporation v. Razore Land Company*, 135 Wn. App. 106, 126, 144 P.3d 1185 (2006).

The *Bestfoods* test is appropriate for this Court to apply here, as it gives meaning to the term “control” under RCW 70.105D.020(22)(a), and ensures that those who are responsible for pollution, and in a position to control that pollution, bear the costs of cleanup. Applying this test to the facts of this appeal, DNR respectfully requests that the Court affirm the trial court’s order, reverse the Court of Appeals, and conclude that DNR does not have “owner or operator” liability under MTCA at Port Gamble.

II. ARGUMENT

A. The Federal Test of *Bestfoods*, as Applied by *Taliesen* and *Unigard*, Is the Correct Standard for Operator Liability Under MTCA. This Is An Appropriate Test That This Court Should Apply.

DNR agrees with Ecology that under MTCA, liability is explicitly joint, strict, and several, and that a state agency “person” can be potentially liable. See RCW 70.105D.040(1); RCW 70.105D.020(24); see also Br. of Ecology at 3-5. However, before any such liability can attach, that agency must first fall under one of MTCA’s defined categories of liable “persons.” See RCW 70.105D.040. At issue in this appeal is the language of RCW 70.105D.020(22)(a), which creates liability under MTCA for an

“owner or operator” of a facility. Specifically as it relates to Ecology’s arguments, the issue is the scope of Washington State precedent establishing the test for a “person” to have operator liability under MTCA, and whether this Court should adopt that precedent and apply it in the present matter.

Despite Ecology’s assertion that there is no “either part” to MTCA’s definition of “owner or operator,”¹ the courts in this state have interpreted the terms “owner or operator” separately. As the court in *Taliesen* concluded, “[t]he Act defines ‘operator’ as any person ‘who exercises any control over the facility.’” *Taliesen*, 135 Wn. App. at 125. *See also Unigard*, 97 Wn. App. at 428 n.27 (Court of Appeals recognized that a potentially liable person was named as an “operator” and not as an “owner” of a facility because he did not personally hold title to the site or equipment). Indeed, Judge Melnick was correct in his dissent in this case that “[a]lthough the majority does not distinguish between the terms owner and operator, the plain language of the statute at issue clearly differentiates between the two.” *Pope Res., LP v. DNR*, 197 Wn. App. 409, 426, 389 P.3d 699 (2016) (Melnick, J. dissenting). Ecology’s interpretation of MTCA’s “owner or operator” definition is simply not consistent with the plain language of the statute.

¹ Br. of Ecology at 7.

Ecology states that MTCA's definition of "owner or operator" is different from that contained in CERCLA, as MTCA's use of the term "any" makes liability broader under MTCA than under CERCLA. Br. of Ecology at 9-12. Ecology further argues that "[t]he statutory difference between CERCLA and MTCA was not addressed in either *Unigard* or *Taliesen*." Br. of Ecology at 12. However, Division I did examine the differences between MTCA's and CERCLA's operator liability provisions in *Taliesen* and concluded that the federal standard of *United States v. Bestfoods* is the applicable standard under MTCA.

In *Taliesen*, Division I considered the exact argument advanced by Ecology in this matter and rejected it. Two of the liable parties in *Taliesen* argued that:

The Act [MTCA] imposes liability on any person who has "any control" over a facility. [former] RCW 70.105D.020(12)(a). Golder and Razore propose that the Legislature's use of the word "any" shows an intent for a broader sweep of operator liability under the State Act than under the federal Act. Razore argues that since Murphy obviously had physical control over the drilling equipment, Murphy fits within the statutory definition of having "any control" over a facility.

Taliesen, 135 Wn. App. at 126.

The *Taliesen* court compared the differences in the operator liability language between MTCA and CERCLA and, in doing so, recognized that "federal cases interpreting similar 'owner or operator' language in the

federal act are persuasive authority in determining operator liability.” *Taliesen*, 135 Wn. App. at 127. As with its previous decision in *Unigard*, the *Taliesen* court concluded that the appropriate test to determine operator liability under MTCA is that an “operator” “must manage, direct, or conduct operations specifically related to pollution. . . .” *Taliesen*, 135 Wn. App. at 128 (quoting *Bestfoods*, 524 U.S. at 66-67). In reaching this decision, the *Taliesen* court stated that “the persuasive authority of the federal cases demonstrates that the key word in our state statute is ‘control’, not ‘any.’” *Id.* (emphasis added).

By focusing on the word “any” in RCW 70.105D.020(22)(a), Ecology does not give adequate meaning to the terms “exercises” and “control” in the statute. Indeed, Ecology recognizes that the term “control” is not defined anywhere in the statute and, therefore, “must be given a judicial interpretation.” Br. of Ecology at 11-12. This “judicial interpretation” is in both *Taliesen* and *Unigard*.

One of the side effects of Ecology’s argument is that it, too, could have liability as an “owner or operator” under MTCA. As Ecology argues, a person can “exercise[] control” by choosing to limit or not limit the uses to which a facility can be put. Br. of Ecology at 6. At Port Gamble, it was Ecology and its predecessor, the Pollution Control Commission, that had the authority to limit, or choose not to limit, the pollution from the mill.

CP at 269. Ecology also exercises “any” control over various facilities by permitting the discharge from sewage outfalls, including the outfall located to the west of Port Gamble. CP at 268. Simply put, adopting a test for “operator” liability that focuses on “any” control, regardless of whether or how that control was exercised at a facility, casts the liability net too far under MTCA. This is why the courts in *Taliesen* and *Unigard* looked to federal precedent to strike the right balance for MTCA’s operator liability provisions.

Although Ecology asserts that the holdings of *Taliesen*, *Unigard*, and *Bestfoods* are limited to their facts,² this is not the case. All three decisions involved different factual scenarios, and they each applied the same legal test. For example, *Bestfoods* involved the potential liability of a corporate parent for the acts of a subsidiary, *Bestfoods*, 524 U.S. at 55, 61-70; *Unigard* involved the liability of a corporate officer and sole shareholder, *Unigard*, 97 Wn. App. at 428-431; and *Taliesen* involved the liability of a subcontractor, *Taliesen Corp.*, 135 Wn. App. at 124-128.

Federal cases have continued to extend the application of *Bestfoods* to situations involving the government’s potential liability as an operator. See, e.g., *United States v. Township of Brighton*, 153 F.3d 307, 314 (6th Cir.

² Br. of Ecology at 12-14.

1998); *Lockheed Martin Corp. v. United States*, 35 F. Supp. 3d 92, 121 (D.D.C. 2014); and *City of Wichita v. Trustees of APCO Oil Corp.*, 306 F. Supp. 2d. 1040, 1055 (D. Kansas 2003). Multiple cases applying the same test under different sets of facts are not outliers; they establish the correct precedent that the Court should look to as persuasive authority in this appeal.

B. Ecology's Position Is Inconsistent With the 1992 Memorandum of Agreement Between the Agencies.

In 1992, a mere three years after MTCA took effect, DNR and Ecology entered into a Memorandum of Agreement Concerning Contaminated Sediment Source Control, Cleanup, and Disposal (Agreement). CP at 283-307. Among other things, the Agreement sets forth the understanding between DNR and Ecology regarding DNR's potential defenses for contamination on state-owned aquatic lands. CP at 269. The Agreement provides that:

DNR may have reasonable defenses based on not being an 'owner-operator'. . . . These reasonable defenses may apply to situations where DNR did not: control the finances of the facility, manage the employees of the facility, manage the daily business operations of the facility, or have authority to daily operate/maintain environmental controls at the facility.

CP at 289 (emphasis added).

While Ecology disputes DNR's characterization of this Agreement, the uncontested evidence contained in the record before the Court comes

from the Declaration of DNR Aquatics Division Manager Kristin Swenddal, who states that “[t]his agreement outlines the understanding between the Department of Ecology and DNR regarding contamination from hazardous substances on state-owned aquatic lands.” CP at 269. Because this Court is reviewing an order granting summary judgment, its review is confined to the record that was before the trial court. *See* RAP 9.12. As Judge Melnick, in reviewing this record, correctly recognized, “[t]his language in the MOU evinces Ecology’s recognition that DNR’s role as a manager was to act as the public’s custodian of the land, and that it would not be liable under MTCA unless it played an active role in controlling the operation of the facility.” *Pope Res.*, 197 Wn. App. at 428. (Melnick, J., dissenting).

The language of the Agreement between Ecology and DNR is significant because it adopts a pre-*United States v. Bestfoods* federal test as an applicable standard to determine DNR’s potential operator liability under MTCA. This federal test was succinctly summarized in *FMC Corporation v. United States Department of Commerce*, 29 F.3d 833 (3rd Cir. 1994). *FMC Corporation* involved a determination of whether the U.S. government’s involvement in textile rayon production made it liable as an operator. The factors the *FMC Corporation* court applied to its analysis were:

[W]hether the person or entity controlled the finances of the facility; managed the employees of the facility; managed the daily business operations of the facility; was responsible for the maintenance of environmental control at the facility; and conferred or received any commercial or economic benefit from the facility, other than the payment or receipt of taxes.

FMC Corp., 29 F.3d 833, 843 (citing *United States v. New Castle Cty.*, 727 F. Supp. 854, 869 (D. Del. 1989)). Unlike the United States in *FMC Corporation*, DNR never had the level of control at Port Gamble to be liable as an “operator” at that site. *See FMC Corp.*, 29 F.3d at 844-845 (government exerted significant day-to-day control over operations, including building plants, supplying raw materials, arranging for an increased labor force, and supervising employee conduct).

There cannot be any reasonable dispute that DNR does not meet the *FMC Corporation* standard set forth in the Memorandum of Agreement at Port Gamble. Although Ecology states that it appropriately named DNR as a potentially liable person at this Site,³ it does not explain why it has diverged from the Agreement, and at what point its legal interpretation changed. Land managers in this State should have predictability in knowing when the actions of third parties will subject them to hazardous waste liability. It is this predictability that DNR seeks from the Court in this appeal.

³ Br. of Ecology at 18.

Ecology also argues that its interpretation of RCW 70.105D.020(22)(a) should be given great weight. Br. of Ecology at 17. While an agency's interpretation of an *ambiguous* statute may be given great weight where the statute is within the agency's special expertise,⁴ the Court is "not bound by an agency's interpretation of a statute," and "[t]he agency's interpretation of pure questions of law is not accorded deference." *Chicago Title Ins. Co. v. The Office of the Ins. Comm'r*, 178 Wn.2d 120, 133, 309 P.3d 372 (2013). *See also Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 184, 157 P.3d 847 (2007) ("the judiciary has ultimate authority to construe statutes; an administrative interpretation may be only given deference, it is never authoritative.").⁵

Finally, any weight that this Court decides to give to Ecology's interpretation should go to the 1992 Agreement, given the close proximity between the execution of that Agreement in 1992 and the implementation of MTCA in 1989. *See Green River Cmty. Coll. Dist. No. 10 v. Higher Educ. Pers. Bd.*, 95 Wn.2d 108, 118, 622 P.2d 826 (1980) (administrative

⁴ *See Utter v. BIAW*, 182 Wn.2d 398, 421, 341 P.3d 953 (2015).

⁵ Ecology asserts that MTCA's "owner or operator" definition is not ambiguous. Br. of Ecology at 1, 7, 9, 12, 13. As this Court has recognized, the general rule is that "when a statute is ambiguous, the construction placed upon the rule by the administrative agency charged with its administration and enforcement should be given great weight in determining legislative intent." *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 813-814, 828 P.2d 549 (1992). Nevertheless, "[s]imply because the words of a statute are not defined in the statute does not make the statute ambiguous. If that were true, the majority of statutes would suffer from ambiguity." *Id.* at 814.

construction nearly contemporaneous with the passage of a statute may be entitled to great weight). The language of RCW 70.105D.020(22)(a) has not changed since its enactment. *See* Laws of 1989, ch.2, § 2.

C. To “Manage, Direct, or Conduct Operations Specifically Related to Pollution. . . .” Is the Proper Test to Determine Operator Liability Under MTCA.

Ecology contends that DNR’s citation to federal case law is inappropriate under MTCA, and that any test requiring “active involvement” in the polluting activities of a facility should not apply to an evaluation of operator liability under MTCA. Br. of Ecology at 7. However, the active involvement standard comes from an examination of federal cases both pre- and post-*Bestfoods*. Specifically, those cases that have applied the *Bestfoods* test have done so by looking at the involvement of an entity in the polluting activities in question. Accordingly, “active involvement” in the operational decisions specifically related to pollution is not by itself the test for operator liability, but such involvement is a consistent factor that the courts have looked at in applying the *Bestfoods* test under different factual scenarios. *See, e.g., Township of Brighton*, 153 F.3d at 314; *Lockheed Martin Corp.*, 35 F. Supp. 3d at 121; and *City of Wichita*, 306 F. Supp. 2d at 1055. Therefore, it is entirely appropriate for this Court to look to those cases for guidance in this appeal.

Ecology's view of MTCA would subject DNR to liability regardless of whether DNR conducted any management activities on state-owned aquatic lands related to pollution. For example, if DNR, on behalf of the State, granted a conservation easement on a site, it could have potential liability. Similarly, any leasing activities to carry out a remedy on a contaminated site, such as for a sediment cap, would also subject DNR to liability for any contamination under Ecology's interpretation of MTCA. This simply does not comport with the polluter pays nature of MTCA.

Taliesen is a good illustration of the potential impact of Ecology's interpretation, and why Division I rejected this interpretation in applying the federal standard to the "owner or operator" language under MTCA. In *Taliesen*, the court concluded that a subcontractor who operated equipment that led to a release of hazardous substances was not liable as an "operator," despite technically exercising "any" control over the facility. *Taliesen Corp.*, 135 Wn. App. at 128. In reaching this conclusion, the *Taliesen* court found it important that the subcontractor (Murphy) "did not have authority to decide where to drill and merely followed [the contractor's] directions. Although Murphy had mechanical control over the drilling facility, it cannot be said that [he] had "any control" in the decision-making sense intended by the Act." *Id.* (emphasis in original).

Under Ecology's reasoning, there is no question that the subcontractor in *Taliesen* would have been liable as an "operator." Such reasoning could subject mill employees to "operator" liability, regardless of their lack of authority to make operational decisions at a facility. It also could conceivably subject a lunch truck operator at that same facility to "operator" liability, because that person would have technically exercised "any control" over the facility. This is not what MTCA was intended to do, and it is the reason why the Division I cases look at control in the operational sense to determine liability. Doing so goes right to the heart of what MTCA was intended to accomplish: to hold those responsible for causing pollution, and in a position to make the relevant decisions regarding that pollution, liable. This is appropriate and is the approach that this Court should adopt.

Ecology also argues that it is possible that DNR could assert an affirmative defense under some circumstances under RCW 70.105D.040(3). Br. of Ecology at 8 n.3. Attempting to assert such a defense in every case that could arise on 2.6 million acres of state-owned aquatic lands would be nearly impossible. Nevertheless, before an entity has to resort to proving an affirmative defense under MTCA, the court must first apply the "statutory criteria (enumerated in RCW 70.105D.040) to the facts." *Seattle City Light v. Dep't of Transp.*, 98 Wn. App. 165, 170, 989 P.2d 1164 (1999). If the criteria of the statute does not apply, the court's

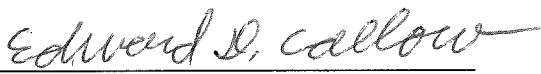
inquiry ends. In this appeal, DNR does not meet MTCA's definition of "owner or operator" at Port Gamble, and accordingly, the trial court correctly ended its inquiry by granting summary judgment to DNR.

III. CONCLUSION

DNR does not fall under MTCA's definition of an "owner or operator" at Port Gamble. As such, DNR respectfully requests that this Court reject Ecology's arguments, reverse the Court of Appeals, and affirm the trial court's grant of summary judgment to DNR.

RESPECTFULLY SUBMITTED this 8th day of September, 2017.

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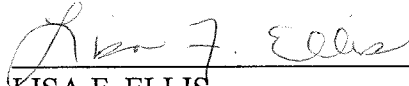
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I certify under penalty of perjury, under the laws of the state of Washington, that the foregoing is true and correct.

DATED this 8th day of September, 2017, at Olympia, Washington.

A handwritten signature in cursive script, appearing to read "Lisa F. Ellis", is written over a horizontal line.

LISA F. ELLIS

Legal Assistant

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ATTORNEY GENERAL'S OFFICE - NATURAL RESOURCES DIVISION

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